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42 U.S.C. Section 1983 Update

Presented at the Legal Officers' Section
by Elliot B. Spector, Esq,
International Assn. of Chiefs of Police, Inc.
2002 Annual Conference in Minneapolis

espector@sackspec.com
October 2002

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Investigative Detention

Robles v. Prince George's County, Maryland, 302 F.3d 262 (4th Cir. 2002)

At approximately 3:30 a.m., officers responded to a noise complaint at an apartment complex. Upon checking for outstanding warrants, they discovered a traffic warrant for plaintiff issued by the neighboring county. The officers attempted an informal transfer but the dispatcher indicated that officers from the county were too busy. The officers drove the plaintiff to a deserted shopping center in the county and tied him to a metal pole using three pairs of flex cuffs. They left a note at his feet explaining the outstanding warrants. They then drove out of sight and placed a call to the county police department reporting the situation but not identifying themselves.

The trial court granted defendants' motions on the federal constitutional claims but allowed the case to proceed to trial on the state constitutional claims and state torts. The jury rendered a verdict of $647,000.00 in compensatory and punitive damages. The court granted a motion for remittitur or, in the alternative, a new trial, but plaintiff rejected the court's remittitur award of $240,000.00. A second trial, which was limited to damages, resulted in a jury award of $25,0000.00 in compensatory damages and $15,000.00 in punitive damages.

On appeal, plaintiff claimed that the court erred in granting summary judgment on the Fourth Amendment claim because there was no legitimate reason to handcuff him to a pole and abandon him. Therefore, the manner of the seizure was unreasonable. The court ruled that the Fourth Amendment applied only to the initial decision to detain plaintiff and not the conditions of his confinement. By the time plaintiff was brought to the county, his arrest had been completed and the circumstances of the arrest comported with Fourth Amendment safeguards. His status at that time was of a pretrial detainee who could make a claim under the Fourteenth Amendment Due Process Clause. The court found that plaintiff stated such a claim as the police behavior was not reasonably related to any legitimate law enforcement purpose and the harm that he suffered was more than de minimus. The court found that although the officer's actions were foolish and unorthodox, it was not clear at the time they acted that such action violated constitutional rights. Therefore, they were entitled to qualified immunity. The court did note that from this point on such "Keystone Kop" activity that degrades subjects of detention and lacks law enforcement purpose will constitute a due process violation.

The trial judge's remittitur of $240,000.00 was reasonable given the brevity of the detention, the absence of any physical abuse and a lack of any evidence of lost wages or medical treatment. The court also found the trial judge's denial of an attorney fee award reasonable, since the plaintiff prevailed only on the state constitutional claims. Finally, the court disallowed the punitive damage award against the municipality but affirmed the punitive damages award against the individual officers leaving the plaintiff with $30,000.00.

Marshall v. Tske, 284 F.3d 765 (7th Cir. 2002)

Milwaukee officers appealed a jury verdict and judgment awarding plaintiff $30,000.00 in compensatory and $100,000.00 in punitive damages as well as $86,375.00 in attorneys' fees. The plaintiff, a thirteen-year-old African American male, ran from undercover officers approaching a drug raid fearing that he was about to be robbed or shot. He ran from the undercover officers who were wearing maroon jackets and carrying guns directly toward uniformed officers who did not know of the ongoing raid. Claims of the undercover officers that the windbreakers had the words, **police narcotics** and the police emblem clearly revealing their identity was refuted by a uniformed officer who indicated it was only after they pointed their guns at the undercover officers did they pull down flaps to reveal their identity. After the uniformed officers handcuffed the plaintiff, the undercover officer pulled down his pants exposing his genitals. Plaintiff's parents explained to the officers that their son had been home all day and was merely out trying to find his brother, to which the undercover responded, "Don't you understand, don't you f------ understand?"

Plaintiff was taken to the police station held in a cell for four hours and was issued a citation for obstructing. He remained in the cell for another five hours before being driven home. The officers attempted to rely on Illinois v. Wardlow, claiming they had probable cause to believe that plaintiff was involved in the drug activity because he had run from the area where a drug search was about to be conducted and they knew that young black males were used as lookouts. The court found the reliance on Wardlow to be misplaced. First, there was conflicting testimony as to the position plaintiff was in when he began running. Second, Wardlow's running was unprovoked where the plaintiff was running like hell, not to get away from officers, but to get **to** uniformed officers for protection. Third, once the search of Marshall developed no evidence to lead to the belief that he was, in any way, involved in the drug activity, even if the officers had reasonable suspicion, they certainly did not have probable cause. The court upheld the award of punitive damages as all the actions after the initial stop were indicative of a callous disregard for Marshall's rights, especially considering his age and the fact that his parents were at the scene of the arrest pleading for his return to their custody.

Torbet v. United Airlines, Inc., 298 F.3d 1087 (9th Cir. 2002)

After Torbet's bag passed through an x-ray scan, he was selected for a random search. He refused, causing the security personnel to summon a police officer who explained the random search policy. Torbet stated that he wished to leave the airport but was advised that he was not free to leave until the bag was searched.

"Passengers placing luggage on an x-ray machine's conveyer belt for airplane travel, at a secured boarding area, impliedly consent to a visual inspection and limited hand search of their luggage if the x-ray scan is inconclusive in determining whether the luggage contains weapons or other dangerous objects." The court ruled that an x-ray scan may be deemed inconclusive even when it doesn't affirmatively reveal anything suspicious. Consequently, any x-ray scan that doesn't rule out every possibility of dangerous contents is, of necessity, inconclusive. The court ruled that there was no fourth amendment violation in searching Torbet's bag or telling him that he could not leave.

Miller v. City of Nichols Hills Police Department, 42 Fed.Appx. 212 (10th Cir. 2002)

Upon calling in an expired license tag, Officer Jennings was informed that NCIC had the tag as being from a stolen vehicle. He initiated a felony stop procedure ordering Mrs. Miller and her two daughters, just twelve and thirteen, out of the vehicle at gunpoint and down on their knees. After being patted down and placed in a cruiser, they determined that this was a mistake due to improper programming of the computer. Because the officers were entitled to rely on the reasonably trustworthy information provided to them by the dispatcher, even though the information was later determined to be faulty or inadequate, the officers had probable cause to make the warrantless arrest. The excessive use of force issue went to a jury, which found for the defendants.

Clark v. City of Reno, 26 Fed.Appx. 634 (9th Cir. 2001)

Eleven armed officers in a K-9 Unit responding to a report of gun fire, surrounded the apartment building and ordered four residents out of the apartment. After ascertaining that they were not armed, plaintiffs were handcuffed and placed face down on the ground. The court found that because there was no basis for believing that any particular resident was the alleged shooter and because all were cooperative, these actions went beyond those proper for a reasonable investigatory detention. They also found that the entries of the apartment, and searching through cupboards and drawers looking for a weapon was an unreasonable search. Evidence that it is was the department's policy to automatically arrest persons, with or without probable cause, when responding to reports of gunfire, was sufficient proof of an unconstitutional policy to overcome summary judgment. The failure to train officers on proper detention in search procedures claim failed as videotape evidence concerning training showed that officers may have acted in a manner inconsistent with their training.

Excessive Force

Clem v. Corbeau, 284 F.3d 543 (4th Cir. 2002)

The court affirmed the denial of summary judgment on behalf of an officer who shot a fifty eight year old, mentally disturbed man, who had not taken his medication or eaten in three days, and within moments before the shooting had been pepper sprayed twice. Officer Corbeau contended that a reasonable officer would have had reason to believe that Clem was armed or otherwise sufficiently dangerous to justify the use of deadly force, however, his fellow officer never believed that Clem was armed and while both officers spent several minutes close to Clem, neither saw bulges in his pockets or waistline. When he was coming toward the officer, his hands were obviously empty. The officer also claimed that Clem posed an immediate threat of bodily harm because the pepper spray had no effect on him, Clem was larger (2 inches and 45 lbs.) and was rapidly charging toward him. All of the witnesses testified that Clem who was 58 years old was blinded and gagging from the pepper spray, and was fumbling toward the bathroom, therefore posing no serious risk of harm to the 28 year old, discharged marine who was standing holding a 26 inch metal baton.

The court also discussed the discrepancies between the officer's initial interviews with the investigators and his report with his later contentions in support of his summary judgment motion. It also mentioned that the fellow officer was behind Clem in the line of fire.

Caricofe v. Mayor & City Council of Ocean City Maryland, 32 Fed.Appx. 62 (4th Cir. 2002)

Responding to a call from a desk clerk at a hotel, officers found the plaintiff, a large naked man, approximately 290 pounds and over six feet tall, jumping around and banging himself against the walls. Officers attempted to calm him by talking to him, but he continued to act in an aggressive manner, banging on the walls, growling and flexing his muscles. The fourth officer that arrived brought a violent prisoner-restraining device, which was a rope that was used to bind the feet of violent prisoners.

When the plaintiff stumbled onto the floor, the officers used this opportunity to try to restrain him with handcuffs. After the officers placed two sets of handcuffs on either hand, plaintiff threw the officers off, stood up swinging his arms violently with the two sets of handcuffs still attached. The officers then all pepper-sprayed him, which seemed to have no effect. After he pinned one of the officers against the wall, they began striking him in the buttocks and legs with their batons.

The plaintiff then ran down the stairs into the parking lot where the officers attempted to tackle him. Other officers arrived and one ran over and used pepper foam to no apparent effect. They then continued to use their batons, but plaintiff ran away again. The officers converged on the plaintiff and used the restraining device. Eventually he stopped moving and prior to the arrival of paramedics stopped breathing. The cause of his death was "multiple drug use and arterial sclerotic cardiovascular disease."

The court concluded that the sequence of events demonstrated a reasoned and restrained approach. The fact that plaintiff died after a struggle was most tragic, but it could not be said that it was from any unreasonable conduct on the part of the police.

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001)

Mrs. Deorle dialed 911 when her husband lost control of himself and began banging on the walls and screaming. She removed herself and her children from the home. Approximately thirteen officers responded securing the area while awaiting the arrival of the Special Incident Response Team. Officer Rutherford who had been at the scene for thirty to forty minutes, set up a position where he observed Deorle for about five to ten minutes. He observed Deorle carrying an unloaded, plastic crossbow in one hand and a bottle of charcoal lighter fluid in the other. Rutherford, who was armed with a 12-gauge shotgun loaded with less lethal beanbag rounds decided to shoot Deorle when he passed a small tree approximately thirty feet away. Prior to the time of the shooting, Deorle had followed the officer's instructions and dropped a number of objects when being ordered to so do.

When Rutherford shouted at him to drop the crossbow, he discarded it. Without warning Deorle to stop or warning him that he was going to be shot, Rutherford aimed at this torso, striking him in the face, resulting in multiple fractures to his cranium, loss of his left eye, and embedded lead shot in his skull.

The court determined that although Rutherford admitted that the rounds could have lethal capabilities at thirty feet and are potentially lethal up to fifty feet, the cloth-case shot appeared to fall short of deadly force as defined by statute to be "that force which is reasonably likely to cause death."

The Court ultimately determined that Rutherford's use of force was unreasonable and that he would not be entitled to qualified immunity. This is not a situation that will provide for the type of latitude allowed by Graham, as Rutherford was not a lone officer, suddenly confronted by a dangerous armed felon threatening immediate violence. He also did not attempt to evade arrest, he stayed on his own property and did not pose an immediate safety threat, as he had responded to the officer's instructions and did not attack anyone.

Also, Deorle might never have passed the predetermined spot had Rutherford given him warning or commanded him to halt. At the time of the shooting Rutherford was confronted by an emotionally disturbed individual who was possibly intent on committing suicide. He was unarmed and walking toward Rutherford at a normal gait. No officer could reasonably have believed that under these facts, this shooting, which was reasonably likely to cause serious physical injury, could constitute reasonable force.

Pace v. Catobianco, 283 F.3d 1275 (11th Cir. 2002)

When Davis was pulled over for motor vehicle violations he gave the officer a false name and social security number. While being patted down, he ran back to his car and started it. The officer sprayed him with pepper spray as he drove off. Over the next fifteen minutes, five police cars engaged in a high speed pursuit during which Davis turned in front of one cruiser, swerved his car into an oncoming police cruiser, drove through someone's front yard at 50-60 mph, almost hit an elderly motorist and accelerated toward a police car trying to block the road. When he entered a cul-de-sac, officers blocked him on three sides, jumped out of their car and ordered him to get out of his car. Within a matter of seconds two deputies fired ten shots killing Davis.

The appellate court refused to accept two of the plaintiff's contended facts. An eyewitness "believed that Davis was raising his hands towards the roof in an attempt to surrender." Because supporting affidavits must be made on personal knowledge, the court rejected this "belief", no matter how sincere "a belief" is, it is not equivalent to "knowledge". The court also rejected the eyewitness's "conclusory" remark that Davis posed no threat of serious physical harm to the officers, as his opinion did not take into account the facts that were not within his knowledge regarding Davis's prior actions.

Ultimately the court found that the officers were entitled to summary judgment, as Davis would have appeared, to a reasonable police officer, to be gravely dangerous. First, his aggressive use of his automobile gave probable cause to believe that he had committed a felony involving threatened infliction of serious physical harm. Second, he never left his automobile or turned off the engine. He used the automobile in a manner giving reasonable police officers probable cause to believe that it had become a deadly weapon. Although Davis had stopped seconds before the shooting, he never turned off the car or got out of the vehicle upon being ordered to do so, therefore a reasonable officer could believe the pursuit had not ended.

Claybrook v. Birchwell, 274 F.3d 1098 (6th Cir. 2001)

Three plainclothes officers approached plaintiff who was standing holding a rifle near a vehicle in front of a small convenience store that was used for illegal betting. They believed that a robbery was taking place. In fact, plaintiff was acting as a security guard for his daughter-in-law who was about to deposit illegal betting proceeds. Claybrook and the officers each thinking the other(s) were robbery suspects, told each other to drop their weapons and a gunfight ensued. During the gunfight an officer was wounded. Claybrook attempted to reposition himself behind the officers who claimed to have been trying to identify themselves to Claybrook. In a subsequent gun battle, Claybrook was killed.

The appellate court divided the events into three segments: 1) the officer's approach and confrontation of Claybrook; (2) the initial firefight taking place in front of the market; (3) the shots fired after Claybrook's move to a position behind the concrete steps. The court found only the last two segments in which the officers actually employed deadly force to be material to the summary judgment analysis. Because there was a disputed issue of fact as to which side fired the first shot, the court found it had no jurisdiction to decide the motion for summary judgment.

Whitlow v. City of Louisville, 39 Fed.Appx. 297 (6th Cir. 2002)

Department used a risk assessment matrix to determine whether the SWAT team should be called out. Although only twenty-five points was needed, there were thirty points made in the determination to deploy the SWAT team to arrest Whitlow who had beaten his girlfriend and held her hostage for three days. Two points were allocated for a search warrant, two for an arrest warrant for crimes against persons, ten for a warrant for firearms used during the commission of a crime, ten because the subject's house was fortified or the subject had guard dogs and six if the officers believe the subject is always armed.

The officers forced entry with a ram, deployed a distractionary device and yelled at Whitlow who was holding a gun, to drop it. Instead Whitlow raised his arms resulting in Officer Estes shooting him with a three round burst from his machine gun.

Plaintiff's claim that the officers failed to conduct an adequate investigation that should have showed the girlfriend fabricated much of her story was irrelevant to the use of force issue. Plaintiff's claim that the distractionary device prevented Whitlow from realizing the intruders were police was also not accepted, as there was no reason to believe that this device made him unable to hear the officers shout "police" or see that they were police who were wearing full police gear. The shooting officer acted legally in self-defense.

Richmond v. Sheehan, 270 F.3d 430 (7th Cir. 2001)

The judge ordered that the plaintiff who was in court to answer a motor vehicle violation with his mother be restrained. Fourteen deputies allegedly forced him to the floor, sat on him and handcuffed him resulting in his death. The court found that officers were not entitled to absolute immunity on the excessive force claim. The court distinguished the situation where officers' conduct is specifically directed by the judge as opposed to the manner in which the judge's order is carried out.

Sinclair v. City of Des Moines, 268 F.3d 594 (2001)

Two officers arriving at the scene of an altercation were encountered by a young woman who told them two males who had assaulted her had fled to the top floor of the building. The officers knocked on the apartment door and when the door opened, they saw Adam Clark holding what they believed to be a long barrel rifle. One of the officers fired four times at Clark, killing him. The court upheld the summary judgment ruling in favor of the officers finding that no constitutional or statutory right exists that would prohibit a police officer from using deadly force when faced with an apparently loaded weapon.

Headwaters Forest Defense v. County of County of Humboldt, 276 F.3d 1125 (9th Cir. 2002)

The 9th Circuit Court of Appeals again took up this case after the Supreme Court vacated its earlier judgment and remanded it for further consideration in light of Saucier v. Katz. The court reaffirmed its earlier judgment finding that the officers were not entitled to qualified immunity.

Applying the two-part test of Saucier, they determined first that viewing the evidence in the light most favorable to the protestors, a rational juror could conclude that the use of pepper spray against the protestors constituted excessive force. Then addressing the issue as to whether the right was clearly established, the court concluded that it would be clear to a reasonable officer that using pepper spray against the protestors was excessive under the circumstances. Because officers had control over the protestors, it was unnecessary to use pepper spray to bring them under control. Further, the authorized full spray blast was inappropriate in light of the manufacturer's label expressly discouraging spraying from distances of less then three feet. Finally, it would have been clear to any reasonable officer that the

defendant's refusal to wash out the protestors' eyes with water constituted excessive force under the circumstances.

The court stated that it was not prevented from denying defendants qualified immunity merely because no prior case prohibited the use of the precise force at issue. Although LaLonde v. County of Riverside was not identical, it was similar enough to put the officers on notice. In addition, regional and statewide police practice and protocol clearly suggested the use of pepper-spray against nonviolent protestors was excessive.

Phelps v. Coy, 286 F.3d 295 (6th Cir. 2002)

During the booking process, a handcuffed arrestee raised his foot on the request of the booking officer. Another officer saw this as an attempt to kick his compatriot and tackled the arrestee. While sitting on top of him he hit him in the face twice, grabbed his shirt and allegedly banged his head into the floor at least three times. The appellate court affirmed the denial of summary judgment.

The Sixth Circuit maintained its position following the "continuing seizure rule" applying the fourth amendment use of force test from the time of arrest to when the arrestee is released from custody. It analyzed the events in segments giving due deference to the officer's on the spot decisions. In doing so, it found the relevant segment was what happened after the officer tackled the handcuffed plaintiff and was sitting on top of him. The court found there was simply no governmental interest in continuing to beat Phelps after he had been neutralized, nor could a reasonable officer think there was.

Santos v. Gates, 287 F.3d 846 (9th Cir. 2002)

Plaintiff claims that police officers broke his back. Following a three-day trial, the district judge granted judgment as a matter of law in favor of the defendants. The appellate court reversed because the evaluation of plaintiff's claims depended principally on credibility determinations and drawing of factual inferences from circumstantial evidence, both of which are functions of a jury. Plaintiff had a long history of psychological problems, substance abuse and brushes with the law. On the morning of the incident he described himself as mildly intoxicated after having breakfast, including a cup and a half of Jack Daniels. He claims that after getting off the bus he ran from two police officers approaching him because he had not been reporting to his parole officer. When a chain link fence blocked his way, he sank to his knees and interlocked his hands behind his head, given prior experience, assuming this position would prevent the officers from doing anything to him. He said he felt pain, and seeing a white light remembers saying, "Why did you have to break by back, I wasn't doing anything?"

The officers claim they responded to a call of a man screaming and falling down on the street. When one of the officers grabbed his wrists, he went limp and sunk to the ground. The officer grabbed him by the arm and shoulder and guided him to the ground. Because he began screaming, "they are beating me up", the officers called their supervisor. The supervisor spoke to three eyewitnesses across the street but did not file a report as to what they told him. A hospital x-ray revealed a 10-20% compressed fracture of the L-2 vertebrae. Under a Graham analysis the jury may find that the officers used excessive force. Plaintiff appeared guilty of nothing more than public intoxication, did not pose a significant or immediate risk to the officers who admitted he was passive, and there was no evidence that he actively resisted. Finally, the severity of the injury supported an inference that the force used was substantial.

Wilkey v. Argo, 43 Fed.Appx. 925 (6th Cir. 2002)

Plaintiff's wife described to an officer how her husband had been drunk the night before, fired a gun in the air and that after she told his parents about it, she said that she had worried his parents to death,

and that "maybe someone needs to show how it feels." Later the officers responded to the hospital where the wife worked after being informed that the husband was there. They approached him as he was walking toward his vehicle in the parking lot. He stopped and consented to a pat-down, which did not reveal a gun but another object that turned out to be a stinger flashlight. Plaintiff removed the object, displayed it and then put it back in his pocket. The officer accused him of carrying an asp and reached into plaintiff's pocket. The plaintiff pushed his hand away, the officer spun him around, pinned him to the hood by placing his forearm under plaintiff's chin, and told him to go home and work things out with his wife, without further inspecting the flashlight.

"…where some degree of force is necessary, gratuitous acts against a person who has been seized might violate the fourth amendment's reasonableness standard."

The court found that a jury could reasonably find that the officer's actions were neither commensurate with the threat nor consistent with the desire to determine whether plaintiff was carrying an asp.

Jackson v. City of Bremerton, 268 F.3d 647 (9th Cir. 2001)

A melee resulted at a public park when officers attempted to arrest a young man on a felony warrant. His family and friends who had gathered at a picnic, refused to obey the officer's commands to disperse and the plaintiff interfered with the arrest. She alleged she was pepper-sprayed, pushed to the ground and roughly handcuffed resulting in a fractured finger. She was then placed in a cruiser where the officer rolled up the windows and turned up the engine on a hot July day. The court found that the use of force was objectively reasonable as the officers were executing a felony warrant, were substantially outnumbered by persons who refused to obey the officers commands to disperse and engaged in verbal and physical altercations. Jackson's active interference posed an immediate threat to the officer's personal safety.

False Arrest/Malicious Prosecution

Fairley v. Luman, 281 F.3d 913 (9th Cir. 2002)

The court affirmed a jury award of $11,250.00 and $92,211.00 in attorneys' fees. After taking the plaintiff into custody on a restraining order, officers found two misdemeanor warrants for Gerald Fairley, plaintiff's identical twin brother. Although the physical descriptions were similar, the weight differed by approximately 66 pounds and they had different driver's license numbers. The plaintiff and his wife told the police that they believed the warrants were for the twin brother and police officers had knowledge of the twin. Still the police held the plaintiff for twelve days without doing a fingerprint comparison or checking with the motor vehicle department. The court found that the failure of the City to institute readily available procedures for decreasing the risk of erroneous detention deprived plaintiff of his due process rights. This was especially true in light of testimony from the chief that it was not uncommon for individuals to be arrested on the wrong warrant, and it was particularly acute when twins were involved.

Pasiewicz v. Lake County Forest Preserve District, 270 F3d 520 (7th Cir. 2001)

Two women riding horses in a forest preserve saw a naked man standing in the middle of a trail. They reported their observations to rangers giving similar descriptions. The next day one of the women saw the person she believed had been in the woods sitting in a car in a school parking lot. She saw him

again the following day and reported this to the officers who made a warrantless arrest without inquiring as to his whereabouts on the day of the viewing.

In his objection to the motion for summary judgment, the plaintiff argued, at length, his innocence and airtight alibi. The court found this to be essentially irrelevant since when officers obtain information from an eyewitness or a victim establishing the element of a crime, the information is almost always sufficient to provide probable cause absent evidence that the information or person providing it is not credible. When probable cause has been gained from a reasonable victim or eyewitness, there is no constitutional duty to investigate further. The court did agree with the plaintiff's arguments that the officers "should" have obtained a warrant, however, they did not have to. Finally, the plaintiff claimed that the arrest was unlawful because the officers violated state statute by making the arrest outside their jurisdiction. The court rejected this argument finding that a violation of a state statute is not a ***per se*** violation of the federal constitution.

Panfil v. City of Chicago, 2002 WL 2003724 (7th Cir. 2002)

Daniel Panfil was mistakenly arrested on December 24th on a warrant issued for his identical brother, Dale. Despite his repeated protests to the arresting officer, jail personnel and a magistrate he was not released until December 30th. The court ruled that the Fourth Amendment is not violated by an arrest based on probable cause even if the wrong person is arrested. Where an arrest is made on a warrant it is constitutional when the officers have probable cause and reason to believe the person arrested is the person sought. In this case, the plaintiff matched every physical characteristic of the individual named in the warrant except for slightly different first names. Because suspects often use an alias, it was reasonable for the officer to believe that the person named in the warrant, was in fact, the plaintiff. "If an officer executing an arrest warrant, must do so at peril of damage liability under Section 1983, if there is any discrepancy between the description in the warrant and the appearance of the person to be arrested, many a criminal will slip away while the officer anxiously compares the description in the warrant with the appearance of the person named in it, and radios back any discrepancies to his headquarters for instructions."

Claims that are based on a continued detention of individuals after they have been arrested on a valid warrant are governed by the due process clause. The plaintiff claimed that he was deprived of his due process because his fingerprints were not compared with his brothers. Jailing a person for a period of time over his vigorous protests that he is the wrong person, without investigating or bringing him before a magistrate can raise serious constitutional questions, however, in this case, plaintiff was brought before a magistrate and the jail personnel, with the public defender's office, conducted an investigation which proved his innocence.

Carter v. Baltimore County, Maryland, 39 Fed.Appx. 930 (4th Cir. 2002)

Plaintiff who was arrested twice and held in custody for six and thirty-six days respectively on warrants intended for his brother, claimed that he had previously informed a police officer that his brother was using his name. The court found that the district court had erred in converting a motion to dismiss to a motion for summary judgment without giving plaintiff notice and a reasonable opportunity for discovery.

Moran v. Clark, 296 F.3d 638 (7th Cir. 2002)

Initial responding officers and back up officers responding to an officer's distress call mistakenly beat a mentally impaired teenager who was believed to be a burglar resisting arrest. The teenager suffered severe lacerations to the head and a broken ankle. His case was settled for $250,000.00.

Within seventy-two hours the chief publicly acknowledged a mistake and committed himself to punishing wrongdoers. An anonymous call resulted in an interview with one of the officers who gave two statements. The first did not implicate Moran but the second, which did, was recorded. The assigned IAD investigators were never notified of this interview. Despite the fact that no statement of any other officer implicated Moran, the chief took this statement to the circuit attorney. IAD began calling officers back for repeated interviews. Officers' attorneys met with the chief who allegedly stated that he wanted the white sergeant. The chief also made it clear that officers changing their statements would not lose their jobs based on any inconsistencies with their first statements. The second officer later testified that he modified his statement for fear of losing his job, implicating Moran in striking the teenager, but also stated the sergeant had not acted with improper excessive force.

The chief suspended Moran without pay accusing him of assaulting the teenager by striking him with his asp and then spraying mace in his face after the resistance ceased. Following an indictment, the assigned circuit attorney wrote a memorandum detailing inconsistencies in officers' statements that demonstrated how the evidence tended to exonerate Moran. The prosecution proceeded with the jury acquitting Moran of all charges.

Sergeant Moran sued the chief who filed a Motion for Summary Judgment. Moran overcame the summary judgment motion on his malicious prosecution claim by introducing evidence that showed the police department publicly and financially committed itself to producing a culprit for alleged wrongdoing before any such wrongdoing was actually established. He produced evidence of questionable procedures, of pressures placed on officers to incriminate a specific person or corroborate the department's official line and a hasty condemnation of Moran and improper consideration of race. Finally, he offered proof the defendants purposely ignored evidence that strongly tended to exonerate him.

Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002)

Plaintiff, a prisoner, convicted of rape and forcible sodomy, brought a Section 1983 case against the state claiming a due process violation for failure to retest the biological evidence in his case. The court upheld the dismissal of the case because he was essentially seeking to invalidate a final state conviction whose lawfulness had in no way been impugned. "We do not engraft an exhaustion requirement upon Section 1983, but rather deny the existence of a cause of action. Even a prisoner who has fully exhausted available state remedies has no cause of action under Section 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of writ of habeas corpus." Heck v. Humphrey, 512 U.S. 477, at 489 (1994).

Fridley v. Horrighs, 291 F.3d 867 (7th Cir. 2002)

A police informant trying to earn leniency for an arrest involving an automobile theft ring, induced the plaintiff to travel from Ohio, where selling automobile parts with detached V.I.N. numbers was legal, to Illinois, where it was illegal. Plaintiff argued that the police lacked probable cause because they knew or should have known about the affirmative defense of entrapment. Police may not ignore exculpatory facts, including knowledge of facts amounting to an affirmative defense. In this case, the concept of committing the offense originated with the informant who actively encouraged the defendant to commit the crime for the purpose of obtaining evidence for defendant's prosecution, however, the defendant was not able to prove that the officers knew that he was not predisposed to commit the offense. In this case, if the officers had closely monitored the communications between the plaintiff and their informant, they would have known that the plaintiff was entrapped.

Mowbray v. Cameron County Texas, 274 F. 3d 269 (5th Cir. 2001)

After serving nine years in prison for her husband's murder, the plaintiff was acquitted after a second trial. Among other things, Mowbray alleged conspiracy based on failure to disclose exculpatory evidence to her defense counsel and manufacture of false evidence. One question was whether Brisco v. LaHue, 460 U.S. 325 (1983) extended to claims that a witness entered a pretrial conspiracy to commit perjury. The Fifth Circuit joined the First, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits finding that it did, leaving only the Second in disagreement.

The court also found no liability under Brady v. Maryland, 373 U.S. 83 (1963) in that Brady imposes a duty on prosecutors to share exculpatory evidence with the defense, but does not extend to police officers or lab technicians. The duty of officers is to share exculpatory evidence with the prosecutors.

Klein v. Long, 275 F.3d 544 (6th Cir. 2001)

Police arrested the plaintiff after responding to a call from his wife whose finger was bleeding, and told the officers that her husband had been pushing and grabbing her and the children and prevented her from calling the police. The prosecutor declined to prosecute leading to a false arrest claim by the plaintiff alleging that the officers failed to perform a reasonable investigation by not questioning him before the arrest.

The court had previously held in Dietrich v. Burrows, 167 F.3d 1007 (6th Cir. 1999) that officers could be held liable when they did not take into account KNOWN exculpatory evidence in their assessment of probable cause. However, if police have sufficient inculpatory evidence and they do not know of any exculpatory evidence, the failure to make a further investigation does not negate the probable cause. "Law enforcement is under no obligation to give any credence to a suspect's story… nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause." Aahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).

Skunda v. Pennsylvania State Police, ___ F.3d ___, 2002 U.S. App. Lexis 16457 (3rd Cir. 2002)

After being arrested for possession of marijuana, McMillen agreed to work as a confidential informant. He identified Skunda as a seller and agreed to make a controlled buy. Two troopers searched McMillen, gave him $180.00 and escorted him to defendant's residence where they observed him enter the residence and leave approximately seven minutes later. McMillen handed them one plastic baggie containing an ounce of marijuana and related what the defendant was wearing and that the marijuana was purchased in the kitchen. The state trial court, at a suppression hearing, found the troopers' explanations of the controlled buy vague, and that the affidavit did not establish probable cause leading to a nolle of the charges.

In the malicious prosecution action the appellate court analyzed the Franks correcting test.

Step One: "Plaintiff must show that the affiant knowingly and deliberately, or with reckless disregard for the truth, made false statements or admissions that create a falsehood in applying for a warrant."

Step Two: "That such statements or omissions are material, or necessary, to the finding of probable cause."

Facts Removed: In his testimony, the informant mentioned that the troopers waited at the cemetery, therefore, the fact that the troopers saw him enter and exit the residence should be removed.[1[1]]

Omissions Which Should Be Added to the Affidavit: There was another person in the home, that McMillen was a first time, untested C/I against whom there were pending criminal charges and would have been unable to complete subsequent buys.

The court found that after removing the misstatements and adding the omissions, probable cause still remained since the informant identified Skunda as the seller of drugs and performed a controlled buy during which he was taken to the location near Skunda's home, searched, given money and returned minutes later with the marijuana explaining that he bought it from Skunda.

Collateral Estoppel did not prevent the re-litigation of the probable cause issue since there was a lack of privity between the troopers and Skunda in the prior criminal action.

Because the reliability of an informant is not a sine qua none for probable cause, Illinois v. Gates, the fact that the informant was untested and unreliable did not destroy probable cause.

Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002)

The plaintiff was pulled over by an officer for honking her horn at a car that was not moving at a green light. The officer denies her claims that when approached the officer said such things as "what the hell is wrong? Who the hell do you think you are?" He said he was the f------ boss and he would ask all of the questions. He called her a "black bitch" a "f------ black bitch" and said that he "should kick her black ass." He put his nightstick to her face, as she was sitting in the car and then pulled her out of the car by her wrist. She then claimed he shoved her against the car, frisked and handcuffed her and after the cuffs were on, lead her to the trunk of the car, slammed her head down and kept spreading her legs with his foot. At the station she claims a police official said, "These are some really lame charges". The court denied summary judgment as to the claims against the city that it had a pattern and practice of failing to discipline abusive officers such as Ferraro. On appeal Ferraro challenged the denial of summary judgment of the false arrest and excessive use of force claims.

False Arrest: The court found that under Atwater the arrest did not violate the Fourth Amendment. Ferraro had probable cause to believe that plaintiff had committed a violation of the county's noise ordinance. The fact that he did not cite the specific noise ordinance either orally or in his arrest report was irrelevant. "When an officer makes an arrest which is factually supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcements of the wrong offense vitiates the arrest."

Plaintiff claimed that Florida law unlike Texas law did not permit full custodial arrest for non-criminal local laws such as traffic ordinances. Unfortunately, the county ordinance was determined to be a criminal law because imprisonment could be imposed. Plaintiff's claim that the ordinance was unconstitutional is also unavailing since the officer would have had no reason to believe under controlling precedent that the ordinance supporting the arrest might later be declared unconstitutional.

Excessive Force: The court found that Ferraro was not entitled to qualified immunity for excessive force. Under a Graham analysis the court found the use of force to be grossly disproportionate

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[1[1]] In a supplemental affidavit the informant later stated that he had no personal knowledge as to the troopers' movements after he left the cemetery)

and that no officer could believe that it was reasonable to slam an arrestee's head against the trunk after she was arrested, handcuffed and completely secured. Citing Supreme Court and Eleventh Circuit precedent the court stated, "the right to make an arrest necessarily carries with it the right to use some degree of physical coercion, or threat thereof to effect it." Indeed, a physical arrest involves some force and injury, and the use of force is an expected, and necessary part of law enforcement's task of subduing and securing individuals suspected of committing crimes. Because Graham's reasonableness test must embody the allowance for the fact that police officers are often forced to make split second judgments and because government officials are not required to err on the side of caution, qualified immunity is appropriate in close cases where a reasonable officer could have believed that his actions were lawful. However, qualified immunity is not appropriate when the Graham analysis yields an answer that is clear beyond all doubt. This is such a case.

Coons v. Casabella, 284 F.3d 437 (2nd Cir. 2002)

Officer was entitled to summary judgment for issuing a summons to plaintiff who was driving while intoxicated. The court found arguable probable cause based on plaintiff's own admission that he had been involved in a single car accident three hours earlier, had consumed at least three beers and had no alcohol after the accident. The claim that the officer failed to conduct a reasonable investigation by not speaking to medical personnel did not defeat summary judgment since officers are not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest. The fact that plaintiff may have passed sobriety tests three hours later in the hospital did not create an issue of material fact given the time that had elapsed since the accident. The fact that the officer did not specifically mention the accident in connection with the appearance ticket, but instead indicated he made the arrest because Coon's pupils were dilated, would not affect the determination of probable cause.

Brown v. Gilmore, 278 F.3d 362 (4th Cir. 2002)

Brown was arrested for allegedly failing to move her car after a motor vehicle accident. Gilmore, the investigating officer, instructed Officer Pina to make the arrest which resulted in Pina handcuffing the plaintiff and allegedly forcing her into the police cruiser.

The court found that the arrest was lawful. The cars had been blocking traffic on a main thoroughfare during the Memorial Day weekend, and an officer would be expected to request the parties to move their cars before tempers flared. Plaintiff's claim that she did not hear the officer's request to move her car was unavailing since the question was whether a reasonable officer would be justified in the belief that a citizen heard his request. The officer said that he spoke in a loud voice, and the other driver who was further away heard the request. The court also found the use of force to be objectively reasonable. The plaintiff suffered no injury of any magnitude and some of the plaintiff's complained of injuries resulted from the car accident. The court noted that a standard procedure such as handcuffing would rarely constitute excessive force where the officers were justified in making the underlying arrest. The situation also was tense and the officers could have reasonably believed that since she had disobeyed a direct order, she would balk at being arrested. "If courts refused to admit the use of proportionate force in these circumstances, we would be inviting any suspect who is unhappy about an arrest to resist that arrest in the hopes that the officers will simply desist rather than risk liability."

Penn v. Harris, 296 F.3d 573 (7th Cir. 2002)

On a cold December night hundreds of Chicago State University students were evacuated after a fire alarm sounded. After about 45 minutes students were agitated, and one, Penn, started pounding on the dorm's front door yelling profanities at campus officers. The defendant, Harris, opened the door, allowing Penn inside. Penn claims Harris and another officer began beating him without provocation

while the officers claim Penn shoved Harris up against the wall, resulting in his arrest for misdemeanor battery. The district attorney asked the trial court to dismiss the charge with leave to reinstate. Penn filed a lawsuit for malicious prosecution and excessive force, among other things. The district court granted summary judgment on the malicious prosecution claims and allowed the use of force claim to go to a jury, which found the officers had used excessive force but awarded Penn no damages.

The appellate court found that summary judgment on the malicious prosecution claim was appropriate as there is no constitutional right not to be prosecuted without probable cause, therefore, it is not sufficient to merely allege malicious prosecution but instead a plaintiff must claim a violation of a specific constitutional right such as a right to a fair trial. This new standard was enunciated in Newsome v. McCabe, 256 F.3d 747 (7th Cir. 2001). The plaintiff failed to amend his complaint to conform to this standard.

Penn also would not be able to prevail on the state claim of malicious prosecution since it was undisputed that he was banging on the door, yelling profanities, and therefore, there was sufficient probable cause for an arrest for disorderly conduct. It did not matter that the arrest was actually for battery, since this was a "closely related" charge. He also had not shown that the State's criminal case terminated in his favor since an accused must show that the dismissal reflected innocence. Penn's claim that the jury erred in not awarding him at least nominal damages failed since he did not object to the instruction given by the district court that jurors, "may" award nominal damages.

Holcomb v. Oliver, 2001 U.S. App. Lexis 26177, 24 Fed.Appx. 402 2001 WL 1563642 (6th Cir. 2001)

Holcomb claimed that Oliver arrested him in violation of his first amendment right when he yelled, "F--- You, I am a Mother F------ American!" The jury verdict was upheld in favor of the officer as the arrest was based on MORE than Holcombe's protected use of profanity.

Knight v. Jacobson, 300 F.3d 1272 (11th Cir. 2002)

Plaintiff's ex-girlfriend, who lived next door, told Officer Jacobson that Knight had threatened to kill her and appeared visibly upset. The officer knocked on Knight's door and told him to step outside where he arrested him.

Knight claims that the arrest was unlawful because Florida law authorizes warrantless arrests for misdemeanors only if they are committed in the officer's presence. The court rejected this claim finding, "while the violation of state law may give rise to a state tort claim, it is not enough by itself to support a claim under Section 1983."

Knight also claimed that his arrest violated the fourth amendment under Payton v. New York, which held that a warrantless arrest inside the home of a suspect is presumptively unreasonable absent exigent circumstances. The court rejected this claim finding that Payton keeps the officer's body outside the threshold, not his voice. It does not prevent a law enforcement officer from telling a suspect to step outside his home and then arresting him without a warrant.

Williams v. Jaglowski, 269 F3d 778 (7th Cir. 2001)

Plaintiff, a suspended Chicago police officer, arrived at the scene of her boyfriend's apparent suicide. When she repeatedly refused to show identification she was arrested for obstructing. Although a person cannot be arrested for merely failing to identify him or herself, plaintiff as a police officer, had violated a city ordinance by refusing to perform a duty required of her. Because this was a closely related offense to obstruction and because the Supreme Court in Atwater v. City of Largo Vista had indicated that

a custodial arrest may be made for misdemeanor violations, the court affirmed the summary judgment for the defendants.

Search & Seizure

Koch v. Town of Brattleboro, 287 F.3d 162 (2nd Cir. 2002)

Acting on the State's Attorney's advice, officers went to Koch's residence to either issue him a citation or bring him to the police station. They knew the 70 year old suffered from bi-polar disorder and was friendly with Doris Reed who answered the door, but did not live there. Koch, who was standing at the top of the stairs, told them to leave but they followed him to his bedroom. When they knocked on the door, Koch opened the door, allowing one officer to enter and then locked the door. The second officer picked the lock and Koch was handcuffed and transferred to the police department.

The court first found that the officer's "initial entry" was reasonable. Although Reed did not have actual common authority over the residence, an objectively reasonable officer could have believed that she had authority to consent to the entry into the home. The court found that the officers were entitled to qualified immunity on the issue of their "continued presence" over Koch's objection. It was unsettled at the time whether police may remain in a home over the objections of the primary occupant when they enter pursuant to the reasonable belief that the third party, whom the police know has lesser authority, consented to their entry.

Finally, the court found that the officer's "forced entry" into the second floor room was reasonable pursuant to exigent circumstances. "Police may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance." Given Koch's known propensity for erratic behavior and the abrupt manner in which the first officer vanished inside the room, it was reasonable for her partner to believe that she was in danger.

Anobile v. Pelligrino, 274 F.3d 45 (2nd Cir. 2001)

An administrative search was conducted at Yonkers Raceway, which included dormitory rooms. The regulations authorized administrative inspections, including examination of racing facilities and the personal property of persons therein. Individuals waived their rights to object to any search as part of their license application. The court found that neither the administrative regulations authorizing the search nor the apparent consent in the license application justified the search of the dormitory rooms. The court found that the expectation of privacy in one's home (including dormitory rooms) outweighed the regulation providing authority to search "rooms". "Neither the Supreme Court nor this Circuit has ever permitted warrantless administrative searches over persons' residence absent exigent circumstances or unless business was conducted in the home." The court also held that the plaintiff's signing the license application did not constitute consent thereby rendering the dormitory search unconstitutional. The official claiming that a search was consensual had the burden of demonstrating that the consent was given freely and voluntarily. Coercion may be found where one is given a choice between one's employment and one's constitutional rights.

Ramirez v. Butte Silver Bow County, 298 F.3d 1022 (9th Cir. 2002)

An ATF agent obtained a warrant that was facially defective because it provided no description of the evidence sought and did not refer to or incorporate the application or affidavit. Prior to the search the agent handed the homeowner the defective warrant and described the items they were looking for. The

court explained that the absence of the sufficiently particular warrant increased the likelihood and degree of confrontation and deprived plaintiff of their means to be on the look out and to challenge officers who might exceed the limits imposed by the magistrate. "The presence of a comprehensive and valid warrant greatly reduces the perception of unlawful or intrusive police conduct, by assuring the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search," Illinois v. Gates, 462 U.S. 213 (1983). "…citizens deserve the opportunity to calmly argue that agents are overstepping their authority or even targeting the wrong residence."

The court found that the supervisor leading the team could be held liable, but not his subordinates. The supervisor is responsible for making sure that he has a proper warrant that in fact authorizes the search and seizure they're about to conduct. Supervisors must actually read the warrant and satisfy themselves that they understand its scope and limitations and that it is not defective in some obvious way. A supervisor must also make sure that a copy of the warrant is available to give to the person whose property is being searched at the commencement of the search and that such copy has no missing pages or other obvious defects.

Line officers may accept the word of their supervisors that they have a warrant and that it is valid. As long as they make inquiry as to the nature and scope of the warrant, their reliance on their leader's representations about it is reasonable.

Jones v. Williams, 286 F.3d 1159 (9th Cir. 2002)

Plaintiff's son and two others were present when police officers conducted a search pursuant to a search warrant during an operation to locate weapons and contraband related to various gangs. When plaintiff returned from work, she found her house in a shambles and apparently someone had urinated in her iron. The officers testified that they moved a number of items and broke a closet door and some drawers off a dresser. Following a verdict in favor of the defendants, the plaintiff appealed claiming the court erred in rejecting her proposed jury instructions essentially suggesting that even though individual officers cannot be identified as causing any specific damage, the "team" could be held liable because they were there. The court rejected this argument finding that under Section 1983 a plaintiff must show individual participation in the unlawful conduct.

Young v. Harrison, 284 F.3d 863, (8th Cir. 2002)

Young and three of his friends rented a room at a Holiday Inn. While Young was sleeping, his three friends were causing a disturbance and were told by the security officer, on three separate occasions, to return to their room or to go to a common area so as not to disturb other guests. When the security officer told them at 3:00 a.m. that they were being evicted they ignored him resulting in officers being called. The officers went with the security officer to the room where Young was sleeping. After knocking and getting no reply, they entered his room and awoke him with a "sternum rub".

Young claims that the officers violated his fourth amendment rights by making a warrantless entry without exigent circumstances. The court found that hotel guests are not tenants and therefore, did not have all of the rights of tenants under state statute. When Young was justifiably evicted from the hotel, the hotel room reverted to the management, and therefore Young could not assert an expectation of privacy in a place from which he had been justifiably expelled. Young also sued the City claiming it maintained an unconstitutional policy regarding officer involvement in "self-help" evictions. In fact, there was an order which stated that "when it is clear to an officer that the person is a transient guest the officer can ask the tenant to leave or face being arrested for unlawful occupancy or trespass. Plaintiff's claims failed because the order pertained to trespassers and not tenants.

Sparing v. Village of Olympia Fields, 266 F3d 684 (7th Cir. 2001)

Officer Keith went to a Sparing's home to arrest him. Sparing answered the door, standing behind the screen door. When Keith advised Sparing he was under arrest, Sparing asked if he could place something down, and then turned and walked away from the screen door. Keith entered the home taking several steps inside at which point Sparing came back and they both left the house.

The question is whether this "doorway" arrest was lawful. It is clear that officers may not constitutionally enter a home without a warrant to make an arrest, absent consent or exigent circumstances, even if they have probable cause. Payton v. New York, 445 U.S. 573 (1980). It is equally clear that an individual voluntarily standing at the threshold of her home is outside, rather than inside the home for purposes of the Fourth Amendment. United States v. Santana, 427 U.S. 38 (1976). In this case, the court held plaintiff was standing behind the closed screen door prior to the officer taking several steps inside his home and therefore, the entry was unlawful.

The court emphasized that there was no reason in this case to not get a warrant. "When time permits, officers who elect not to obtain a warrant unnecessarily risk the type of constitutional violation involved in this case." Still, the court found that the officer was entitled to qualified immunity since under the facts of this case, the law on this issue was not sufficiently settled or defined at the time of the arrest, to defeat qualified immunity.

Bybee v. City of Paducah, 22 Fed.Appx. 387 (6th Cir. 2002)

During the investigation of a minor motor vehicle accident the officer discovered that Bybee did not possess a license, vehicle registration or liability insurance. Bybee's license and registration were issued by the fictional "Nation of Washitaw" (the territory of the United States except the thirteen original colonies and Texas.) The people who recognize the Nation of Washitaw are referred to as "Freemen" and are known to regularly carry firearms. Upon being informed that Bybee had a firearm, the officer reached inside retrieving the pistol and removed the ammunition cylinder.

The court found that the search of Bybee's truck was reasonable as fear of personal safety can justify actions necessary for the protection of an officer. "Police when making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." Adams v. Williams, 407 U.S. 143 (1972). The Nation of Washitaw affiliation and the admission of having a loaded pistol made it reasonable for the officer to secure the pistol during the course of the investigation.

The court also found that the towing of the vehicle was lawful under the community caretaker function. Bybee's truck constituted a threat to public safety because Bybee had not registered his truck and did not maintain liability insurance.

Finally, the court dismissed the Fifth Amendment due process claims as they are only applicable to actions against the federal government and dismissed the Fourteenth Amendment due process claim because there were adequate state remedies.

Failure to Protect

Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002)

A police supervisor received information that Mr. Lekan who was a paranoid schizophrenic and suffered from post-traumatic stress had threatened his bed-ridden wife by placing a rifle near her bed over the course of several days in front of a visiting nurse. Concerned for the Lekans and their sons, the sergeant had two plainclothes officers dispatched to the Lekan residence to determine whether Mrs. Lekan or her son was in danger. Other officers waited at a nearby shopping center. Mr. Lekan opened the inner door and the officers without identifying themselves, asked to speak to Mrs. Lekan. Mr. Lekan spoke to them through an open window and at one point started to sing the Star Spangled Banner. The officers then identified themselves and again said they needed to speak with Mrs. Lekan. Mr. Lekan slammed the front door after which one of the officers opened the screen door, kicked in the inner door entered the house and was shot by Mr. Lekan. Both officers retreated and the ERT team was called.

Mrs. Lekan called the police to report that someone had been shot and Sergeant Suller asked to call her back on another line. When he did, Mr. Lekan answered stating the first officer was lucky, and he had his .270 rifle loaded and ready to go. Police began negotiations but refused to allow family members to speak with Mr. Lekan. One of two mental health professionals at the scene told the chief that the threat level was high and asked if the officers had a reason not to execute a forced entry as a solution to the stand off. The chief ordered an armed entry using a battering ram, incendiary devices and tear gas. When one of the incendiary devices started a hall fire, the officers stopped to put it out, and exchanged gunfire with Mr. Lekan during which two more officers were injured, resulting in a retreat and continued stand off.

Approximately seven hours after the first assault J.T., the son, spoke to the police saying he was fine but scared. Mr. Lekan took the telephone and asked to speak with his cousin who was a priest. Concluding that the request was a sign of danger and that he might be contemplating a murder/suicide an armored vehicle was driven onto the front lawn illuminating the house. A short time later, the vehicle rammed through the living room wall and injected tear gas into the house. Between 4:00 a.m. and 5:00 a.m. the police heard gunshots and at 11:00 a.m. the chief ordered the vehicle to push through the garage door. The bodies of Mr. Lekan and his son were found.

The city hired an independent consultant to review the incident. In the almost 400 page report the consultant indicated that he didn't believe the incident could be resolved through traditional forms of hostage negotiation and that Lekan set out on a path of self-destruction when he shot the first officer. Among other things he concluded that the tactical entry was conducted too soon, it was a mistake to use the armored vehicle and it was a mistake to interrupt the tactical entry to deal with the fire.

Warrantless Entry: The court found that the "knock and talk strategy" was a reasonable investigative tool to gain the occupant's consent to search. They did not create an exigency by failing to identify themselves. The "created – exigency" cases typically require some showing of deliberate conduct on the part of police evincing an effort to intentionally evade a warrant requirement. Here the forced entry was reasonable since the officers had an armed and emotionally disturbed person inside the home while others inside the home were exposed to danger.

Excessive Force: The fourth amendment test did not apply since Mr. Lekan, his wife and his son, were not seized by the officers. The distinguishing feature of a seizure is the restraint of the subject's liberty. The police did not seize Mr. Lekan merely by surrounding his house. He chose to barricade himself and not submit to official authorities. The court found that the use of a battering ram and incendiary devices against the Lekan home was objectively reasonable. It also found that the use of nondeadly force such as tear gas and psychological tactics, while perhaps ill considered, were not excessive. Summary judgment was affirmed as the use of deadly force was employed only when Mr. Lekan was firing at the officers.

Substantive Due Process Claims: The due process clause does not impose liability on the state for injuries inflicted by private acts of violence. The two exceptions to this rule are (1) when the state fails to provide protection of individuals in state custody and (2) where affirmative actions directly increase the vulnerability of citizens to danger. The test for liability under the fourteenth amendment is the "shock the conscience" standard. The nature of this standard extends from the "deliberate indifference" to an "intent to harm unrelated to a legitimate governmental interest" depending on whether the circumstances allow the state actors time to fully consider the potential consequences of their conduct.

Here, where the police waited five hours to initiate the first tactical solution and the chief consulted with two mental health professionals and others at the scene, the more appropriate test would be deliberate indifference. "In cases such as this one in which officers must choose among the risks, a plaintiff must show that the police 'knowingly and unreasonably' opted for a course of conduct that entailed a substantially greater total risk than the available alternatives." Although decisions may have been ill advised or negligent and they may have employed better equipment, such as thermal imaging, such conduct does not amount to deliberate indifference.

McClendon v. City of Columbia, 285 F.3d 1078 (5th Cir. 2002)

In this case the court held that a police detective who gave a confidential informant a gun taken from evidence to protect himself from the plaintiff, could not be held liable under the state created danger theory when the informant shot the plaintiff in the face permanently blinding him. The court first found that the plaintiff's constitutional rights were not violated on the facts alleged. At most, the detective's actions amounted to mere negligence, as there was no indication that the informant had any violent intentions toward the plaintiff, that he had a criminal history and they had a long-standing positive working relationship. Therefore, the record did not suggest that he acted with knowledge that his conduct would pose a threat to the plaintiff's safety.

Even if a constitutional violation had been proven, the officer would have been entitled to qualified immunity, as at the time he acted, he would not have known that the right in question was clearly established.

The court then carefully looked at what the "basis" of a clearly established right would be. They determined that Wilson v. Layne, 526 U.S. 603 (1999), suggested that in the absence of directly controlling authority (Supreme Court or Circuit opinion), a consensus of cases of persuasive authority might, under some circumstances, be sufficient to compel the conclusion that no reasonable officer could have believed that his or her actions were lawful. In spite of the fact that six circuits (dissent found two more), had adopted the state created danger theory and none had rejected it, they still found the law not to be clearly established. They determined this because the circuits in question disagreed about the appropriate mental state required ranging from the 9th Circuit deliberate indifference to the 6th Circuit's gross negligence to the 2nd Circuit's apparent intent to injure standard. There was also disagreement as to the uncertainty of the contours of the theory. In addition, none of the courts had applied the state created danger theory to a factual context similar to that of the instant case. The dissent noted that the circuit was hiding the ball from the public as it had refused to take a position on the state created danger theory in seven cases over the past ten years.

DePalma v. Metropolitan Government of Nashville, 40 Fed.Appx. 187 (6th Cir. 2002)

Although the operator claimed she did not hear gunshots, there were screams and two gunshots transmitted over an open 911 line. Officers responded to a non-emergency domestic disturbance in progress call. The operator called back the house saying the police were on the way and received unresponsive comments. Upon getting no response at the door, the officer opened the front door and

stepped inside the foyer. At the top of the stairs, he saw Antonio Neal and asked if everything was okay. Neal was standing with his hands behind his back and stated that everything was fine. He refused to show the officer his hands. Connie Neal appeared, holding a baby and also said everything was okay, but the officer glanced into the living room saw what appeared to be the torso of a body with a bloodlike substance coming from its mouth. The officer backed outside after unsuccessfully trying to get Neal to come with him. After two backup officers were briefed, the dispatcher called the Neal home confirming that everything was NOT all right and informed the officers of this conversation. When the officers were about to enter the home six to twelve gunshots rang out from inside the house. The SWAT team entered to find the four dead adults and an unconscious Antonio Neal. The jury returned a verdict in favor of the police, while the district court rendered a decision on the state law claims finding the 911 operator to be negligent. The district court stated that the plaintiffs proved that the situation would have ended differently had the police officers been given the information necessary to respond to the situation quickly and with a backup force.

Had the officers known that shots had been fired the first officer would have waited to enter the residence with backup officers with their weapons drawn. The court further found that it was entirely likely that the SWAT team and a negotiator would have been called to the scene quickly and that the use of such tactics would have had a good chance of defending the tragedy that took place.

O'Brien v. Maui County, 37 Fed.Appx. 269 (9th Cir. 2001)

Plaintiff was a victim of domestic violence for approximately two years. During that time the police arrested her husband three times, she obtained restraining orders on several occasions and alerted the department of a threat posed by her husband. Such evidence was insufficient to prove a special relationship or that the officers of the department affirmatively placed the plaintiff in danger. It was also insufficient to support plaintiff's equal protection claim, as there was no evidence of discriminatory intent or motive.

Sheets v. Mullins, 287 F.3d 581 (6th Cir. 2002)

On Sunday, February 16, 1997, Sheets reported to Officer Mullins, a long time friend of Montgomery's, that Montgomery had put a knife to her side, pulled a gun on her and threatened to kill her and her children. Her daughter Tiffany was staying at Montgomery's sister's home. Mullins, told Sheets that she would have to wait until Tuesday because Monday was a holiday, to file criminal charges and that she would have to go to court to obtain an order to get Tiffany. It was undisputed that prior to this, Montgomery had been a good father and had never threatened to harm his daughter and at the time of the complaint, Sheets was secure and had no signs of physical injury. After one unsuccessful attempt to locate Montgomery, Mullins made no other effort to contact him, to reunite Tiffany with Sheets, to obtain a warrant for Montgomery's arrest and did not tell other deputies that Montgomery had threatened to kill Sheets and her children.

Early Tuesday, February 18th, Sheets filed a criminal complaint and obtained from the juvenile court an order designating her as having legal custody of Tiffany. On Wednesday, February 19th, Sheets accompanied by a lawyer took the custody order to the department where a sergeant told them that they needed a court order directing the department to assist in taking custody of the child. That same night Montgomery called Mullins at her home and was advised that Montgomery should check in the morning to see if there was a warrant, and if so, that he should turn himself in.

On Thursday morning Montgomery turned himself in but was released on his own recognizance by a judge who refused to order Montgomery to give up physical custody of the child finding that it was in the exclusive jurisdiction of the juvenile court. Later that day, a juvenile court order was issued

directing the sheriff's department to assist Sheets in gaining possession of Tiffany. Unfortunately, before the order was executed Montgomery shot and killed Tiffany as well as himself.

The court found that Mullins did not violate the substantive due process clause by his conduct in that the death of Tiffany was too remote in time and events to support a finding of proximate cause. Also, after describing previous "State Created Danger" cases, the court determined that Mullins would not be on notice that his particular conduct offended the constitution in February of 1997.

Sherry Jones v. Union County, TN, 296 F.3d 417 (6th Cir. 2002)

Over a number of years, plaintiff who was repeatedly beaten by her husband, obtained protective orders and her husband had been arrested on a number of occasions. On September 29, plaintiff obtained her last restraining order. On that day, Officer Jones attempted to serve the order three times. On October 13th, plaintiff's ex-husband entered her bedroom and shot her several times before leaving and committing suicide.

The court found that the plaintiff failed to offer sufficient evidence that would allow a reasonable jury to infer there was a custom or policy for the police to provide less protection to victims of domestic violence than to other victims of violence, or that discrimination against women was a motivating factor, and that the plaintiff was injured by a policy or custom. Plaintiff also claimed a denial of her substantive due process rights based on the department's failure to serve the ex parte protective order on her husband in a timely fashion. She claimed there was a special relationship with defendants as a result of obtaining a domestic order of protection under Tennessee's domestic violence statute. The court found that there was no special relationship created under Tennessee law as "a state may, through its courts and legislators, impose such affirmative duties of care and protection upon its agents as it wishes. But not all common-law duties owed by government actors were… constitutionalized by the fourteenth amendment.

Egebergh v. Nicholson, 272 F.3d 925, 2001 U.S. App. Lexis 25176 (7th Cir. 2001)

The court denied officers' summary judgment motion finding that a jury could find they were deliberately indifferent to a shoplifter's diabetic condition, who died as a result of not taking his insulin. The shoplifter was taken to court without having his insulin shot. Officers allegedly knew that he needed his insulin shot and the court found that a jury could infer that they knowingly exposed him to a risk of substantial danger to his health for no good reason.

Watkins v. City of Battle Creek, 273 F.3d 682 (6th Cir. 2001)

At 2:20 a.m. officers searched plaintiff's apartment for narcotics. When they saw him licking his lips and a pink foamy drool coming from his mouth, they asked him if he swallowed drugs and told him that they would take him to the hospital. He denied swallowing drugs, and approximately an hour later, while in jail, again denied taking drugs and refused medical treatment. He was checked approximately every half hour thereafter and was last seen at 5:05 a.m. standing at a glass door. At 5:30 a.m., he was checked and found behind the privacy wall with no pulse. He was pronounced dead at 5:56 a.m.

Supervisory Liability

Randall v. Prince George's County, Maryland, 302 F.3d 188, 2002 U.S. App. Lexis 16467 (4th Cir. 2002)

Fifteen minutes after a police officer was murdered as he sat in his police cruiser, there were two plaintiffs stopped by county officers. Within the next thirty-six hours, another twelve plaintiffs were detained, brought to the police department for interviews that lasted up to nine hours, and in many cases, handcuffed to hooks on the wall. The jury found three supervisory officers liable for compensatory and punitive damages and awarded $195,000.00 for plaintiffs' attorneys' fees and costs. The verdict against the supervisors was based on concepts of bystander and supervisory liability.

Bystander Liability: "Bystander liability is premised on a law officer's duty to uphold the law and protect the public from illegal acts regardless of who commits them." An officer has an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers. When an officer has a reason to believe that a constitutional violation is being committed and possesses a realistic opportunity to intervene and chooses not to act he can be held liable.

The court explained that in order for the verdict to be sustained the evidence must show that the supervisors knew that a particular appellee was present at the station, that there was an absence of probable cause to detain the appellees and that such person was being held against his or her will. Because there were a number of other unrelated investigations being conducted in which people were being detained involuntarily at the station over this two day period, the court found that even though supervisors knew some of the appellees were present at the station there was insufficient evidence to prove that they knew any specific appellee was being held against his or her will without probable cause.

Supervisory Liability: "Three elements of supervisory liability are: (1) that the supervisor had actual or constructive knowledge that a subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive or practice, and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff."

Many of the plaintiffs claimed they were held well after their interviews on the basis that a supervisor or the lead investigator had to review their statements before they left. The court found that even if this was true, such a practice is not unconstitutional. Further, there was no evidence that it was customary for the police to detain witnesses against their will in the absence of probable cause.

Poole v. City of Los Angeles, 41 Fed.Appx. 60 (9th Cir. 2002)

Plaintiff, who claimed constructive discharge, failed to bring his claim within the one-year statute of limitations.

Continuing Violation Doctrine:

Applies when a plaintiff alleges a series of related acts, one or more of which falls within limitations and when only a few discriminatory acts took place during the limitation period, and that these acts were a part of an ongoing unlawful employment practice.

Test for Constructive Discharge Claim

Plaintiff must demonstrate that looking at the totality of circumstances, a reasonable person in the employee's position would have felt that he was forced to quit because of the intolerable and discriminatory working conditions. (Poole failed to make this showing having resigned more than a year after most of the alleged wrongful events and writing in his resignation letter that his first reason was a desire to take time off to look for his missing brother.)

Frequency and Freshness

"Poole failed to identify any discriminatory or retaliatory act occurring around his resignation date which could have caused a reasonable person to feel compelled to quit." (Example cited the plaintiff resigned three to four months after sexually harassing behavior had ceased.)

Additional Discovery

Claim must show the specific facts would be uncovered which would preclude summary judgment.

PETA v. Rasmussen, 298 F.3d 1198 (10th Cir. 2002)

Defendant's summary judgment motion was denied since demonstrators had a clearly established right to engage in expressive activity on the sidewalk adjacent to a school if no material disruption occurred. PETA members conducted a number of demonstrations outside a junior high school protesting the display of a McDonald's flag. Lt. Rasmussen's threat to arrest the protestors if they did not leave was based on a Utah statute allowing for the arrest of persons adjacent to any school whose presence or acts interfere with the peaceful conduct of the activities or disrupt the school. Unfortunately, this statute applied only to institutions of higher education and not the junior high school in question.

The court noted that content-neutral speech restrictions in a public forum are subject to strict scrutiny, while content-neutral restrictions in a non-public forum are subject to a reasonableness test. While schools are not a traditional public forum, sidewalks are. Therefore, the heightened first amendment standard applied.

"In a public forum, the government may only impose content–neutral time, place and manner restrictions that: (a) serve a significant government interest; (b) are narrowly tailored to advance that interest; and (c) leave open ample alternative channels of communication."

The Supreme Court has recognized a significant government interest in preventing expressed activity that materially disrupts class work or involves substantial disorder or invasion of the rights of others. The government's interest is limited to preventing actual or imminent disturbances, not fear, apprehension or speculation that a disturbance will occur. Quiet and peaceful protests must be tolerated.

Morris v. Crawford County, 299 F.3d 919 (8th Cir. 2002)

Plaintiff who had been arrested for DWI and disorderly conduct was allegedly yelling and banging on his cell door. Deputies brought him to a new cell where Deputy Ruiz severed Morris' intestine with a knee drop. Morris contended that the sheriff acted with deliberate indifference in hiring Ruiz.

"*Bryan County* teaches us that liability may not be imposed unless a plaintiff directly links the applicant's background with the risk that, if hired, that applicant would use excessive force." "The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong."

Ruiz' Arrest Record: Felony arrest reduced to a misdemeanor after paying a fine and ultimately expunged.

Work Background: Slapping an inmate in 1996; mishandling inmate's money and property; mouthing off to fellow deputies and inviting one to fight; disobeying a nurse during which he was heard

to say he was going to "knock that bitch out"; insubordination; cursing other employees and failing to adhere to rules regarding leaving his post and failing to answer the radio.

Personal Relationship Complaints: Ex-wife alleged in 1997 that he ran her off the road, tore a necklace off her neck and pushed her. Girlfriend claimed in 1999 he grabbed her arm and threw her and threatened to assault her. Both obtained ex-parte protective orders.

Plaintiff also put forward evidence that a jail administrator had told the sheriff that Ruiz would cause trouble if hired and an expert witness testified that violent or abusive behavior of any kind indicates a strong potential for violent behavior against persons in custody.

The court found that this was not sufficient evidence to create a genuine issue of material fact that the plainly obvious consequence of re-hiring Deputy Ruiz would be his use of excessive force against an inmate.

Holland Ex Rel. Overdorff v. Harrington, 268 F.3d 1179 (10th Cir. 2001)

Two days after an altercation in which a number of patrons at a steak house were beaten, a misdemeanor warrant was obtained for one of the assailants as well as a warrant to search his residence for evidence of the assault. The SWAT team was deployed at 8:30 p.m., dressed in green camouflage clothing with hoods showing only their eyes. As the team approached, it encountered three young men (24, 18 and 8) playing basketball in the driveway. They were ordered at gunpoint to lie face down on the ground. A 14-year-old boy near the bunkhouse was also ordered to the ground at gunpoint where he was kept in a prone position for nearly 10 minutes. A 4-year-old girl seeing the armed deputies ran screaming into the house, pursued by an officer who aimed his laser lighted weapon on the child's back. The deputies found the suspect and the four women in the home, three of whom were ordered to lie face down on the living room floor.

Decision to Use the SWAT Team: "The decision to deploy a SWAT team to execute a warrant necessarily involves the decision to make an overwhelming show of force - - a force far greater than that normally applied in police encounters with citizens… the decision to use a SWAT team to make a 'dynamic entry' into a residence constitutes conduct 'immediately connected with the seizure' because it determines the degree of force initially to be applied in effecting the seizure itself.

The decision makers claimed that Franklin had a history of violence and there were others on the sixty-acre compound with histories of criminal violence. They also suspected that there were firearms in the residence and did not know how many adults they would encounter. The court found that the plaintiffs failed to show that the display of force inherent in the deployment of the SWAT team was excessive under the fourth amendment.

Specific Conduct of SWAT Deputies: "The display of weapons, and the pointing of firearms directly at persons inescapably involves the immediate threat of deadly force. Such a show of force should be predicated on at least a perceived risk of injury or danger to the officers or others, based upon what the officers know at the time… where a person has submitted to the officer's show of force without resistance and where an officer had no reasonable cause to believe that the person poses a danger to the officers or to others, it may be excessive and unreasonable to continue to aim a loaded firearm directly at that person in contrast to simply holding the weapon in a fashion ready for immediate use." The pointing of firearms at the child bystanders found at the residence violated their constitutional rights. The court also commented on the harsh language used by the SWAT team members. While recognizing the necessity of exercising unquestioned command, they suggested that simple instructions spoken in a firm and commanding tone communicating what the officers want to the subjects is far better than expletives which communicated

little more than the officers' own personal animosity, hostility or belligerence. While harsh language alone could not render a search or seizure unreasonable, it may be sufficient to tip the scales in a close case.

The court also commented on the attitude of the SWAT team members. Being on a SWAT team does not exempt officers from fourth amendment standards, and in fact, given the special training, requires greater discipline, control and restraint.

Finally, the court denied the supervisors' qualified immunity. "We can find no substantial grounds for a reasonable officer to conclude that there was legitimate justification by continuing to hold the young people outside the residence directly at gunpoint after they completely submitted to the SWAT deputies initial show of force or for training a firearm directly upon a four-year-old child at any time during the operation. Davis' supervision of the SWAT deputies during the raid, furnishes the affirmative link between this violation and Davis' conduct; it appears uncontroverted that the SWAT deputies continued to point their weapons at the persons found on the Heflin property until Davis directed them to stop doing so at the conclusion of the search.

Ealum v. Schirard, 2002 WL 1754323 (10th Cir. 2002)

Utah law enforcement officials stopped Vasquez finding 52 pounds of marijuana. He told them he was delivering the marijuana to James in Colorado and agreed to do a controlled delivery. He dropped the marijuana at the home of Sharilee Ealum (where James sometimes stayed) who lived there with four young children, ages 12, 8, 6 and 3 and her mother. It was decided that SWAT should be deployed to secure the residence. Plaintiffs claim that after forcing entry the officers hurried the grandmother and three children into the living room, held guns on them and, at some point, pushed two of the boys to the floor. The court found that if this were true, it would be unreasonable under the fourth amendment. The court also found that it did not appear that there was probable cause to search the residence, let alone exigent circumstances to do so without a warrant.

The court found no liability as to the deputy who called for the SWAT team or the sheriff who ordered the team deployed. There was no evidence that either ordered the officers to use excessive force or exerted any supervisory control over the actual entry. With regard to liability for deploying the SWAT team, the court found that the decision was not, in and of itself, unreasonable since some years earlier there were firearms and body armor in the residence and it was not unreasonable for them to believe that resistance might be encountered.

Brown v. Muhlenberg Township, 269 F.3d 205 (3rd Cir. 2001)

Plaintiff and an objective witness allegedly observed the defendant officer shoot her pet Rotweiller in front of her home five times without any provocation and with knowledge that it belonged to the family who lived in the adjacent house and was available to take custody. A fourth amendment seizure of personal property occurs when there is some meaningful interference with an individual's possessory interest in that property. Destroying property meaningfully interferes with the individual's possessory interest, therefore, the killing of plaintiff's dog constituted a fourth amendment seizure. Although the state has a strong interest in restraining animals at large so they will pose no danger to persons or property, the destruction of a pet which poses no immediate danger when the owner is looking on and desires retaining custody, amounts to a fourth amendment violation.

Supervisory Liability: The department had a policy allowing officers to employ pepper spray against animals and it also set standards as to when deadly force can be used. Since the officer's use of force in this case was contrary to the policy, the department could not be held liable. The court further ruled that

the guidance of a policy manual was sufficient and that the failure to provide formal training on handling of dogs was insufficient to indicate deliberate indifference.

Finally, on the failure to supervise claim, the fact that the officer had killed four other dogs during his sixteen-year career was insufficient to prove supervisory liability since the last incident occurred some ten years before and the other cases involved situations in which officers were being attacked or the neighborhood was being terrorized by a stray dog.

Dubner v. City and County of San Francisco, 266 F.3d 959 (9th Cir. 2001)

Plaintiff was among a group of demonstrators and observers arrested during a demonstration pursuant to citizen arrest forms. The court found that the citizen's arrest was invalid because the citizen did not see the plaintiff, describe her or point her out to the police. Because none of the officers could recall seeing the plaintiff during the demonstration, much less see her break the law, they could not overcome the plaintiff's claim of unlawful arrest. Finally, the City could be held liable for an unconstitutional policy and the chief could be held liable for allowing the practice of the use of incomplete citizen arrest forms to effect unlawful arrests.

Sherwood v. Oklahoma County, 42 Fed.Appx. 353 (10th Cir. 2002)

The plaintiff, an employee of the Oklahoma County Sheriff's Office, was ordered to take some prisoners and paint some old vehicles in a makeshift paint shed that the County's Health & Safety Office determined was unhealthful and in violation of OSHA. Plaintiff and the inmates contracted serious health problems including occupational asthma; difficulty with memory and concentration, painful uncontrollable twitching spasms and plaintiff was disabled from working. The United States Supreme Court in Collins v. City of Harker Heights, 503 U.S. 115 (1992) held that the due process clause is not a guarantee against incorrect or ill advised decisions, nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm.

The appellate court distinguished this case from Collins in that the defendants ordered the plaintiff to paint vehicles using hazardous paint and a makeshift paint booth with no ventilation or other safety equipment. The plaintiff was at risk of losing his job if he refused and the decision was made with knowledge that the painting operation was in violation of the law and in violation of state and federal safety regulations. The court held that a jury could find the defendant's behavior was egregious, outrageous and recklessly indifferent to the serious consequences imposed on plaintiff. Further, the exercise of governmental power by the defendants was without any reasonable justification in the service of a legitimate governmental objective. The defendants placed their desire to paint old vehicles that were not even worth spending $300.00 apiece on, over the health, safety and welfare of the plaintiff. Such arbitrary action pursued without any reasonable justification makes the defendant's deliberate indifference to the rights, health and welfare of the plaintiff actionable.

Miscellaneous

Dixon v. Lowery, 2002 WL 1878459 (8th Cir. 2002)

Omar approached Dixon about an arrangement to turn his restaurant into a bar. A purchase sale agreement was entered into with the closing date left blank. Before the closing there was a disagreement resulting in Omar hiring private duty officers to go to the restaurant with a locksmith to change the locks. A captain and sergeant accompanied Omar to the restaurant where the locks were changed and Dixon's

employees were told to leave. Officers continued to occupy the restaurant for a period of more than three weeks.

"Absent exigent circumstances or a valid consent, prior to the state assisting in depriving a party of possession of property, a neutral officer or magistrate must determine whether there is probable cause to believe that the claiming party is entitled to the relief requested." Soldal v. Cook County, 506 U.S. 56, at 56.

Since the closing had not taken place, Dixon had an arguable property interest; therefore the officers were not entitled to qualified immunity. The court also remanded to the district the issue as to whether the city and chief could be held liable for ratifying the officers' actions when they failed to order them to cease their around the clock occupation of the restaurant.

Kelley v. Laforce, 288 F.3d 1 (1st Cir. 2002)

Buyers of pub brought an action against police officers for conversion, intentional interference with contractual rights and fraud, based on the officers' removal of the buyer's employees from the pub at the request of the owner. The court denied the summary judgment based on the factual dispute as to whether the police knew of Kelley's ownership interest in the pub. The factual dispute was material because it determined whether the police were knowingly confiscating Kelley's property, or believed they were evicting a tenant's employee.

Omni v. Miller, 285 F.3d 636 (8th Cir. 2002)

Omni, a nonprofit corporation providing housing for foster care children, claims that the state cancelled their contract forcing them to close down operations after an investigation by Detective Miller of child abuse. Four of their African American employees were arrested, however, three cases were dismissed and one received an acquittal. The court upheld the summary judgment in favor of the officer finding that there was no liberty interest as plaintiff had an "at will" contract. They also found there was no protected property interest as the contract did not confer a protected status which can be characterized by either extreme dependence (such as welfare, social security benefits or tenured position) or a contract which could be terminated only for cause. There was also insufficient evidence to prove that the investigation and actions of the officers were "shocking to the conscience" and the fact that four African Americans were arrested was insufficient to provide intentional discrimination.

Friebis v. Kifer, 2002 WL 2026437, 2002 U.S. App. Lexis 18161 (6th Cir.)

The jury awarded plaintiff $5,000.00 in an excessive use of force claim when she alleged that an officer grabbed and twisted her arm during the course of an arrest. During the criminal proceedings, her attorney negotiated a release-dismissal agreement in which plaintiff waived all civil claims arising from the incident in exchange for reduced charges. The defendants appealed the district court's refusal to enforce the release-dismissal agreement. There are three tests in determining whether a release-agreement should be enforced: a) whether it was entered into voluntarily; (b) whether there is evidence of prosecutorial misconduct and (c) whether enforcement furthers the public interest. Town of Newton v. Rumery, 480 U.S. 386 (1987).

The court found that the issue of police misconduct factors into the element of "public interest". In taking into consideration the fact that the jury found that the officer violated the plaintiff's constitutional rights, the court refused to overturn the district court's decision.

Martinez v. City of Oxnard, 270 F.3d 52 (9th Cir. 2001)

Two officers were questioning an individual on a narcotics investigation when they heard a bicycle approaching down a darkened path. The officers ordered the rider to stop, spread his legs and place his hands behind his head. During a protective pat-down a knife was found and while the officer was attempting to apply handcuffs, the plaintiff resisted, pulling away. During the struggle, the officer claims Martinez took the officer's gun and pointed it at him. Martinez claims that the officer drew his gun and that Martinez grabbed his hand. All of the parties agree that Officer Salinas called out, "He's got my gun". Officer Pina drew her weapon and shot Martinez five times rendering him blind and paralyzed. At the time the opinion was rendered, the claim of illegal investigative stops and excessive force was to be tried to a jury.

While in the hospital a sergeant began to question Martinez who complained of pain, was choking at least 8 times, claimed that he was dying and continued to drift in and out of consciousness. He repeatedly screamed out in pain and twice said that he did not want to talk to the sergeant. Although none of the statements were used in court, Martinez brought a claim for a Fifth Amendment coerced confession. "A police officer's extraction of a confession is unconstitutional, if, considering the totality of the circumstances, the officer obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overcome." Blackburn v. Alabama, 361 U.S. 199 (1960).

The court found that the sergeant was not entitled to qualified immunity as a reasonable officer in his position would have known that his conduct violated Martinez' fifth and fourteenth amendment rights to be free from coercive interrogation.

Note: Contrary to the opinion, the language in United States v. Derdugo-Urquidez, 494 U.S. 259 (1990) suggests that law enforcement conduct which impairs the right of self-incrimination, only becomes a constitutional violation at trial.

Ayuyu v. Tagabuei, 384 F.3d 1023 (9th Cir. 2002)

Plaintiff, a developmentally handicapped nineteen-year-old male, claimed he was taken to the police station and told to sign a witness confession that he had stolen a wallet. The jury award of $1.00 in general damages and $10,000.00 in punitive damages was upheld in spite of the jury's erroneously marking on the verdict form that they believed the plaintiff's sixth amendment right to counsel was violated. Although the defendant were correct in arguing that the sixth amendment right to counsel does not attach until a lawyer is requested or until prosecution has commenced, their failure to object to the confusing verdict form prohibited them from now complaining about the form on appeal. The jury obviously believed the evidence that the defendants had used improper means in obtaining the confession; therefore, the fifth and fourteenth amendment violations had been established.

Pearl v. City of Long Beach, 296 F.3d 76 (2nd Cir. 2002)

The statute of limitations prevented plaintiff from pursuing a claim against officers who reportedly attacked him in 1967. When he was 16 years old he was beaten by police officers causing blindness in one eye. Plaintiff's first conviction was overturned and a second trial was deadlocked. While the third criminal trial was pending, he settled his civil case for $30,000.00. In 1999 one of the officers submitted a sworn statement stating that the officer's testimony was fabricated and confessed to the beating. The court described at length its ruling based on fraudulent concealment but ultimately ruled that the statute of limitations presented an

insurmountable obstacle. It suggested that the City of Long Beach make amends for this transgression.

Paine v. City of Lompoc, 265 F.3d 975 (9th Cir. 2001)

After the 9th Circuit affirmed the jury verdict in favor of the defendants on plaintiff's excessive use of force claim, plaintiff filed a second action claiming that two of the officers conspired to suppress and fabricate evidence pertinent to his original case. The 9th Circuit has previously ruled that testimonial immunity extends to conspiracies to commit perjury, however, such immunity does not extend to non-testimonial acts such as fabricating evidence or conspiratorial conduct not inexplicably tied to their testimony. In this matter, the court was unable to find any evidence connecting the officers to a non-testimonial conspiracy to fabricate or suppress physical or documentary evidence or to suppress the identities and testimony of eyewitnesses.

Wilson v. Town of Mendon, 294 F.3d 1 (1st Cir. 2002)

The issue in this case was whether the plaintiff should have been permitted to seek a finding against an officer who, although instrumental in the injuries to the plaintiff, was not made a party or brought in as a witness. Although it is well-settled that judgment may not be entered with binding effect against one not actually or constructively before the court and neither a municipality or a supervisor can be held liable if the officer has inflicted no constitutional harm, the jury may be required to make a finding for or against a non-party officer for the purpose of finding liability against a supervisor or the municipality. The court also distinguished between the theories of liability for failure to intervene and liability as a joint tortfeasor. An officer may be liable for failure to intervene to protect a detainee from excessive use of force when such officer has a realistic opportunity to intercede, however, such officer may not be a joint tortfeasor unless there is evidence to support the existence of a joint enterprise, by way of proving that the onlooker officers are instrumental in assisting the actual attacker to place the victim in a vulnerable position.

Livsey v. Salt Lake County, 275 F.3d 952 (10th Cir. 2001)

Sergeant was sued for a violation of the plaintiff's right to privacy when making a comment about her deceased husband whose naked body was found that, "it looked like it was one of those auto-erotic things". The Supreme Court has recognized the individual interest in avoiding disclosure of personal matters. If an individual has legitimate expectations of confidentiality in intimate matters, disclosure of such information must be based on a compelling state interest and must be accomplished in the least intrusive manner. Cases cited where there was no legitimate expectation of privacy included expunged criminal records, police internal investigation files and the records regarding reasons for resignation or employee evaluations or allegations of rape and assault. Cases cited where there was a legitimate expectation of privacy, included disclosure of HIV status, intimate marital matters and confidential medical records. Decedent's wife's claim failed because the personal matter disclosed pertained to her deceased husband, and not her.

Moore v. City of Harrimond, 272 F.3d 769 (6th Cir. 2001)

This case explores the issue of individual versus official capacity claims. This is important for the purposes of determining damages and whether liability would attach at all, since state employees sued in their official capacities are not persons under Section 1983. The majority opinion held that it was not fatal to fail to specifically state when a defendant is sued in their individual capacity. They adopted the course of proceedings test, which considers factors such as whether the plaintiff asked for compensatory or punitive damages, the nature of any defenses raised (particularly qualified immunity) and subsequent

pleadings putting the defendants on notice as to the capacity in which they are being sued. The dissenting opinion believed that plaintiffs should be required to clearly identify the capacity in which the defendants are being sued and that this was not a significant burden since all they would have to do is state that each and all defendants are sued in both their individual and official capacities. The dissent noted in a footnote the large number of frivolous cases being filed in federal court by lawyers and pro se plaintiffs wasting the time of public officials, lawyers and courts.

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